PALMERSTON HOLDINGS SDN BHD

v.

CHONG SIEW ENG

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 22-160-2002]
13 OCTOBER 2006

CONTRACT: *Specific performance - Sale and purchase agreement - Default in payment - Whether plaintiff entitled to decree of specific performance - Whether plaintiff entitled to annul SPA - Whether defendant's claim statute barred*

CONTRACT: *Specific performance - Sale and purchase agreement - Interpretation of - Regulation 11(1) of the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Developers (Control and Licensing) Act 1966 - Whether plaintiff entitled to specific performance - Whether plaintiff entitled to annul SPA - Whether defendant's claim statute barred*

The plaintiff's claim was for specific performance of, *inter alia*, the sale and purchase agreement dated 12 December 1994 ('the SPA') and a sum of RM198,358.12 as at 31 July 2002, with daily interest at 10% p.a on the outstanding progressive payment of RM130,480.64 from 1 August 2002 to the date of realization. The counterclaim by the defendant was for RM136,059, interest at 4% p.a from 11 September 1996 to the date of judgment and 8% p.a thereafter to the date of realization. The agreed facts were that the plaintiff was a licensed housing developer for the condominium known as Ocean Palms in Klebang Melaka ('the condominium'). The defendant, a Singapore national, had applied to the plaintiff to purchase a unit of the condominium ('the unit') for which the plaintiff had acknowledged receipt of RM5,000 from the defendant. The parties herein executed the SPA on 12 December 1994 for the unit at a consideration of RM247,380. The state authority had on 12 May 2000 granted written approval to the defendant to purchase the unit. On 4 February 1998, the plaintiff had demanded from the defendant the sum of RM125,903.63 inclusive of interest as at 31 January 1998 which eventually amounted to RM171,730.83 inclusive of interest as at 28 February 2001 ('the balance sum'). Thus far, the defendant had made progress payments amounting to RM136,059 and had

A defaulted in the payment of the balance sum thereafter. The issues that arose: (1) whether the plaintiff was entitled to specific performance of the SPA and or/damages due to breach of contract by the defendant and (2) whether the defendant's counterclaim was barred under the Limitation Act 1953.

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Held:

(1) The facts of the case would call for the application and interpretation of the SPA contained in sch. H to reg. 11(1) of the Housing Developers (now 'Housing Development') C (Control and Licensing) Regulations 1989, made under the Housing Developers (now 'Housing Development') (Control and Licensing) Act 1966 (collectively 'the housing legislation'). (para 44)

D **(2)** Applying the principles of interpretation to the facts of the instant case and having regard to the provisions of the SPA, it was plain and obvious that the plaintiff as the developer was not entitled to the decree of specific performance. However, as the defendant had failed to pay the instalments E payable under cl. 4(1) in accordance with the third schedule thereto or any part thereof, and the interest under cl. 8, the plaintiff as vendor was entitled to annul the SPA and deal with the unit under cl. 9(1)(a)(i). The instalments in the sum of RM136,059, excluding interest, previously paid by the F defendant, being more than 50% of the purchase price of RM247,380, shall be dealt with and disposed of under cl. 9(1)(a)(ii)(a) and (b)(ii). (paras 52, 53, 54 & 55)

(3) The defendant's counterclaim was not statute barred because G of the plaintiff's final letter of demand was dated 26 June 2003 and the defendant's counterclaim was filed in 2003. (para 57)

(4) This court gave judgment for the plaintiff in the sum of RM113,530.48 which was to be deducted from the total H amount of RM136,059 paid by the defendant by way of instalments to the plaintiff pursuant to the SPA. Judgment was also given for the defendant in the above residue sum of RM22,528 with interest at 8% p.a from the date of judgment to the date of realization. (paras 58 & 59)

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[Order accordingly; parties to bear their own costs.]

Case(s) referred to:

Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 ***(refd)***

Lim Sin Oo & Ors v. Cheah Tjeng Siong [1989] 1 CLJ 953; [1989] 2 CLJ (Rep) 68 HC ***(refd)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***

Tan Tian Seng & Anor v Grobina Resorts Sdn Bhd [2005] 7 CLJ 70 HC ***(refd)***

Tribunal Tuntutal Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ 617 CA ***(refd)***

Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203 FC ***(refd)***

Zaibun SA Syed Ahmad v. Loh Koon Moy & Anor [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(refd)***

Legislation referred to:

Housing Developers (Control and Licensing) Regulations 1989, reg. 11(1)

Interpretation Acts 1948 and 1967, s. 17A

Other source(s) referred to:

Salleh Buang, *Malaysian Law on Housing Developers*, 2002, 2nd edn, pp 7, 8

For the plaintiff - Kee Tong Kiak; M/s Chee Siah Le Kee & Partners

For the defendant - Yau Jiok Hua (Yong Chen Lim with him); M/s Yong Chen Lim & Saridah

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Claim And Counterclaim

[1] The plaintiff's claim is for:

(1) specific performance of *inter alia* the sale and purchase agreement dated 12 December 1994 ("the SPA");

(2) a sum of RM198,358.12 as at 31 July 2002, with daily interest at 10% p.a. on the outstanding progressive payment of RM130,480.64 from 1 August 2002 to the date of realisation;

(3) damages with interest, *in lieu* of or in addition to specific performance; and

(4) costs.

[2] The counterclaim by the defendant is for RM136,059, interest at 4% p.a. from 11 September 1996 to the date of judgment and 8% p.a. thereafter to the date of realisation.

Agreed Facts

[3] The plaintiff is a licensed housing developer for the condominium known as Ocean Palms in Klebang Melaka ("the Condominium").

[4] The defendant, a Singapore national, had on 27 September 1994 applied to the plaintiff to purchase unit No. 08-04 Block 1 Sandy Tower of the Condominium ("the unit") for which the plaintiff had acknowledged receipt of RM5,000 from the defendant *vide* receipt No. 94090026 of the same date.

[5] Prior to this, on 28 December 1993, plaintiff's architect Akitek Regional ("the architect") issued a certificate certifying the completion of the unit up to item 2(a).

[6] On 3 October 1994, the architect issued another certificate certifying completion of the unit up to item 2(b).

[7] On 14 October 1994, defendant's solicitors sent to the plaintiff's solicitors four sets of the SPA.

[8] *Vide* letter dated 26 October 1994, defendant's solicitors submitted the application forms dated 25 October 1994 to the land administrator Melaka Tengah ("the land administrator") for approval of the state authority to purchase the unit.

[9] On 27 October 1994 and 17 November 1994, plaintiff's solicitors sent two letters respectively enclosing the architect's certificates dated 28 December 1993 and 3 October 1994, to the defendant's solicitors.

[10] The parties represented by their own solicitors executed the SPA on 12 December 1994 for the unit at a consideration of RM247,380 subject to the terms and conditions therein.

[11] *Vide* letter dated 6 January 1995, defendant's solicitors applied to the Foreign Investment Committee ("FIC") of the Economic Planning Unit, Prime Minister's Department for approval to buy the unit.

[12] Defendant's solicitors *vide* letter dated 7 January 1995 sent the stamped SPA to the defendant.

[13] The architect issued a certificate dated 13 February 1998 certifying that the works had been completed up to item (d). On 18 February 1998, the plaintiff's solicitors sent that certificate to the defendant.

[14] Defendant's solicitors sent another letter dated 21 March 1995 to the land administrator enquiring about the defendant's application for FIC approval.

[15] *Vide* letter dated 4 April 1995, FIC informed the defendant's solicitors that it has stopped processing the defendant's application because foreign acquisition of plaintiff's Condominium had exceeded the 30% quota, which the defendant's solicitors had duly informed the defendant *vide* letter dated 2 May 1995.

[16] *Vide* letter dated 9 May 1995, defendant's solicitors informed plaintiff's solicitors that FIC had rejected the defendant's application and that the plaintiff should stop accepting progress payments.

[17] Defendant's solicitors *vide* letter dated 13 June 1995 informed the defendant that the plaintiff would appeal for an increase in the quota to 50% which was allowed by FIC *vide* letter dated 6 May 1996.

[18] *Vide* letter dated 5 July 1995, plaintiff informed plaintiff's solicitors that it would continue to collect progress payments.

[19] On 18 July 1995, defendant's solicitors sent a letter to plaintiff's solicitors enquiring if the plaintiff had submitted the application forms to FIC.

[20] Defendant informed the plaintiff's manager on 8 September 1995 that she wanted to change the unit to #06-02 Sunshine Tower ("the Sunshine Tower unit").

[21] On 12 September 1995, the architect issued a certificate certifying that the works had been completed up to item 2(e)

[22] Defendant's solicitors *vide* letter dated 13 September 1995 informed plaintiff's solicitors that plaintiff had agreed to reserve the Sunshine Tower unit until the defendant had received a reply from FIC.

[23] *Vide* letter dated 14 November 1995 to the defendant, plaintiff agreed to postpone the progress payments until FIC approval or such other date fixed by the plaintiff, in any event not later than 14 days before delivery of vacant possession of the unit.

[24] *Vide* certificate dated 11 July 1996, the architect certified that works were completed up to item 2(f).

[25] On 18 July 1996, defendant's solicitors wrote to plaintiff's solicitors enquiring if the plaintiff had submitted defendant's application to FIC.

[26] FIC had *vide* letter dated 10 September 1996 informed the plaintiff that FIC had no objection to the defendant's purchase of the unit subject to the defendant incorporating a local company with 70% of the shares held by Malaysians before 31 December 1997 ("the condition").

[27] Plaintiff *vide* letter dated 18 September 1996 sent architect's certificates dated 12 September 1995 and 11 July 1996 to the defendant and demanded payment of RM61,845.

[28] Defendant *vide* letter dated 3 October 1996 appealed to FIC against the imposition of the condition.

[29] *Vide* letter dated 5 October 1996, defendant's solicitors requested plaintiff to appeal to FIC for an unconditional approval and the defendant wished to rescind the SPA if the plaintiff agreed.

[30] Plaintiff *vide* letter dated 16 October 1996 informed the defendant's solicitors that the defendant has to fulfil the obligations to make progress payments and to apply direct to FIC.

[31] FIC *vide* letter dated 31 October 1996 informed defendant's solicitors of FIC's rejection of the defendant's appeal.

[32] *Vide* certificate dated 1 November 1996, the architect certified that works had been completed up to items 3, 4(a) and 4(b), in addition to the certificate of fitness for occupation dated 1 November 1996.

[33] Plaintiff's solicitors *vide* letter dated 8 November 1996 gave notice to the defendant to take vacant possession and claimed a sum of RM111,902.02 inclusive of interest under the SPA, the particulars of which were enclosed therewith.

[34] Plaintiff sent a reminder dated 14 July 1997, demanding payment of the balance sum.

[35] Defendant had on 26 September 1997 filed Form 1 with the Melaka Historical City Council for the transfer of the ownership of the unit to the defendant.

[36] FIC *vide* letter dated 17 November 1997 informed the plaintiff that FIC had disallowed the defendant's appeal.

[37] *Vide* letter dated 17 November 1997, plaintiff informed the defendant that FIC had not rejected the defendant's application for approval and that the defendant has to fulfil the obligation to pay the balance of the purchase price.

[38] Defendant's solicitors *vide* letter dated 9 December 1997 urged FIC to reconsider defendant's appeal.

[39] The state authority had on 12 May 2000 granted written approval to the defendant to purchase the unit. On 4 February 1998, plaintiff's solicitors demanded from the defendant the sum of RM125,903.63 inclusive of interest as at 31 January 1998 which eventually amounted to RM171,730.83 inclusive of interest as at 28 February 2001 ("the balance sum").

[40] Strata title for the unit has been issued.

[41] So far, the defendant has made progress payments amounting to RM136,059, and has defaulted in the payment of the balance sum thereafter.

Agreed Questions For Determination

[42] Although parties have agreed that there are four issues for determination, I would with the utmost respect narrow down the relevant questions to the following:

(1) Whether the plaintiff is entitled to specific performance of the SPA and/or damages due to breach of contract by the defendant? and

(2) Whether the defendant's counterclaim is barred under the Limitation Act 1953?

[43] I would however express my gratitude to learned counsel for the respective parties herein for their enormous efforts in preparing and presenting their submissions on other issues which would require no further consideration by me.

Principles Of Interpretation

[44] In my judgment, the facts of the case would call for the application and interpretation of the SPA contained in Schedule H to reg. 11(1) of the Housing Developers (now "Housing Development") (Control and Licensing) Regulations 1989, made under the Housing Developers (now "Housing Development") (Control and Licensing) Act 1966 (collectively "the housing legislation"). It is trite law that the housing legislation is principally aimed at protecting the interest of purchasers: see *Malaysian Law on Housing Developers*, 2nd edn by Salleh Buang, 2002 pp. 7 and 8; *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 per Suffian LP (as he then was); and *Khau Daw Yau v. Kin Nam Realty Development Sdn. Bhd.* [1983] 1 MLJ 335, per VC George J (later CA).

[45] In *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617, the Court of Appeal through the judgment of Richard Malanjum JCA (now CJ (SS)) had the occasion to consider the housing legislation and enunciated the following principles:

1. It is a settled principle of law that statutes must be read as a whole, at p. 624E (see: *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559);

2. There are circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament, at p. 624g-h (see *Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia* [2002] 4 CLJ 689; *S.E.A. Housing Corporation Sdn. Bhd., supra*); and

3. The housing legislation is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation ie, to promote the general legislative purpose underlying the provisions. (See also s. 17A of the Interpretation Acts 1948 and 1967).

[46] On further appeal, *sub nom. Westcourt Corporation Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203, the Federal Court through the judgment of Ahmad Fairuz CJ Malaysia approved the Court of Appeal's enunciation of the above principles governing the interpretation of the housing legislation. See also my judgment in *Tan Tian Seng & Anor v Grobina Resorts Sdn Bhd* [2005] 7 CLJ 70 HC at pp. 76 and 77.

Specific Performance, Purchaser's Default And Counterclaim

[47] Mr. Kee Tong Kiak, plaintiff's learned counsel referred to the plaintiff's letter of demand dated 26 June 2002 requiring the defendant to make payments pursuant to the SPA. The plaintiff sought specific performance on the strength of the following authorities:

(1) *Lim Sin Oo & Ors v. Cheah Tjeng Siong* [1989] 1 CLJ 953; [1989] 2 CLJ (Rep) 68 HC;

(2) *Sekemas Sdn Bhd v. Liang Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 FC; and

(3) *Zaibun SA binti Syed Ahmad v. Loh Koon Moy & Anor.* [1982] CLJ 457; [1982] CLJ (Rep) 58 PC.

(collectively "the said three authorities").

[48] It was canvassed by learned counsel for the defendant Mr. Yau Jiok Hua (Mr. Yong Chen Lim with him) that the plaintiff should have availed itself of cl. 9 of the SPA.

[49] Having carefully considered the SPA, I am unable to find any provision giving the plaintiff ie, the developer the right to obtain the decree of specific performance. Probably that was the reason why plaintiff's learned counsel was unable to draw my attention to any clause providing for such a remedy in favour of the plaintiff.

[50] By contrast, in the said three authorities cited for the plaintiff, I find that the agreement in each of them specifically provided for the remedy of specific performance.

[51] In all the said three authorities, specific performance was decreed, but I am of the view that they are not useful to the plaintiff herein.

[52] Applying the above principles of interpretation to the facts of the instant case and having regard to the provisions of the SPA, I am of the view that it is plain and obvious that the plaintiff as the developer is not entitled to the decree of specific performance.

[53] However, as conceded by the defendant, the plaintiff is entitled to invoke cl. 9 of the SPA which applies in the event of default by the purchaser and determination of the SPA. Clause 9 reads:

> **9. Default by Purchaser and determination of Agreement**
>
> (1) If the Purchaser:
>
> (a) fails to pay any instalments payable under Clause 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under Clause 8; or
>
> (b) (not relevant)
>
> (c) (not relevant)
>
> the Vendor may, subject to sub-clause (2) hereof, annul the sale of the said Parcel and forthwith terminate this Agreement and in such an event:
>
> (i) the Vendor shall be entitled to deal with or otherwise dispose of the said Parcel in such manner as the Vendor shall see fit as if this Agreement had not been entered into;
>
> (ii) the instalments previously paid by the Purchaser to the Vendor, excluding any interest paid, shall be dealt with and disposed of as follows:
>
> (a) firstly, all interest calculated in accordance with Clause 8 hereof owing and unpaid shall be paid to the Vendor;

(b) secondly, an amount to be forfeited by the Vendor as follows:

(i) where up to fifty per centum (50%) of the purchase price has been paid, an amount equal to ten per centum (10%) of the purchase price;

(ii) where more than fifty per centum (50%) of the purchase price has been paid, an amount equal to twenty per centum (20%) of the purchase price;

(c) lastly, the residue thereof shall be refunded to the Purchaser;

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

(iv) each party hereto shall pay its own costs in the matter.

(2) If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by A. Registered post ttreat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

[54] As the defendant has failed to pay the instalments payable under cl. 4(1) in accordance with the Third Schedule thereto or any part thereof, and the interest under cl. 8, the plaintiff as vendor is entitled to annul the SPA and deal with the unit under cl. 9(1)(a)(i).

[55] The instalments in the sum of RM136,059, excluding interest, previously paid by the defendant, being more than 50% of the purchase price of RM247,380, shall be dealt with and disposed of under cl. 9(1)(a)(ii)(a) and (b)(ii).

[56] The computation may be tabulated as follows:

Particulars	RM
1. Interest claimed by the plaintiff as vendor under cl. 8; and to be paid to the plaintiff under cl. 9(1)(a)(ii)(a)	64,054.48
2. 20% of the instalments of RM136,059 to be paid to the plaintiff under cl. 9(1)(a)(ii)(b)(ii)	49,476.00
3. Residue to be refunded to the defendant as purchaser under cl. 9(1)(a)(ii)(c)	22,528.52
Total	136,059.00

[57] The above computation provides the answers to the above two questions for determination. The defendant's counterclaim is not statute barred because the plaintiff's final letter of demand was dated 26 June 2002 and the defendant's counterclaim was filed in 2003.

Conclusion

[58] On the foregoing grounds, I give judgment for the plaintiff in the sum of RM113,530.48 which is to be deducted from the total amount of RM136,059 paid by the defendant by way of instalments to the plaintiff pursuant to the SPA.

[59] I also give judgment for the defendant in the above residue sum of RM22,528.52, with interest at 8% p.a from the date of judgment to the date of realisation.

[60] In view of the submissions presented for the parties herein, I order the parties to bear their own costs.